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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2021-000249

In the Matter of the Care and Treatment
of John O'Neil Johnson,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large.

STATEMENT OF THE CASE

In January 1981, Appellant John O'Neil Johnson pled guilty to criminal sexual conduct in the first degree, which is a statutorily delineated sexually violent offense, and was sentenced to thirty years incarceration. In 2004, Appellant was charged with criminal sexual conduct in the first degree arising from the sexual assault of a thirty-five year old female believed to have an intellectual disability. He pled guilty to assault and battery of a high and aggravated nature and was sentenced to five years incarceration.

In November 2007, Respondent State of South Carolina initiated proceedings pursuant to the South Carolina Sexually Violent Predator Act (SVPA), S.C. Code Ann. §§44-48-10, *et seq.* (2018), seeking Appellant's civil commitment for long term control, care and treatment. In July 2008, Appellant voluntarily committed to the Department of Mental Health (DMH) Sexually Violent Predator Treatment Program (SVPTP). As required by the SVPA, DMH reviewed Appellant's mental status annually, and in March 2020, a DMH psychologist issued an annual review report concluding Appellant's mental status had not so changed he was safe to be at large.

After a hearing, at which Appellant appeared and was represented by counsel, the Honorable Benjamin H. Culbertson, Circuit Court Judge, found there was no probable cause to believe Appellant's mental status had so changed he was safe to be at large, and continued Appellant's civil commitment for long term, control, care and treatment. This appeal followed.

STATEMENT OF FACTS

In July 2008, Appellant voluntarily committed to DMH's SVPTP for long term control, care and treatment. Thereafter, his mental status was reviewed annually, and each review found Appellant's mental status had not so changed he is safe to be at large.

In March 2020, Rozanna Tross, Psy.D., issued an annual review report diagnosing Appellant with other specified personality disorder with antisocial features, and concluding Appellant's mental status had not so changed he is safe to be at large, and he should remain in the Sexually Violent Predator Treatment Program (SVPTP) for further long term control, care and treatment. Appellant obtained an independent evaluation by Yadira Baez Lockard, Psy.D. ("Lockard"), and requested an annual review probable cause hearing, asserting there was probable cause to believe he was safe to be at large.¹ The matter was called for a hearing on January 16, 2020, before the Honorable Benjamin H. Culbertson, Circuit Court Judge.

Lockard was qualified as an expert in forensic psychology, and testified she reviewed the documents from Appellant's original commitment proceeding, his 2016-2020 treatment records and annual review reports. She also testified she interviewed Appellant for approximately four hours over two occasions, and conducted psychological testing on a third occasion for an additional three and a half hours. (Hearing Transcript [HT], pp. 70-72; Record on Appeal [R.], pp. ____). Based on Appellant's statements during the interviews, particularly his statements regarding the family support he would have if released, and the documents she reviewed, Lockard testified Appellant no longer met the criteria for commitment under the SVPA based on her opinion he was no longer a risk to reoffend sexually. (HT, p. 113; R., p. ____).

¹The DMH Director did not authorize Appellant to file a release petition. *See* S.C. Code Ann. §44-48-120(A) (2018) (Director certifies in writing the resident is safe to be at large and authorizes resident to petition the court for release).

On cross-examination, Lockard testified she only reviewed the treatment program records and annual reviews from 2016-2020, and never requested any treatment records from Appellant's commitment in 2008 through 2015. She admitted there were inconsistencies between Appellant's statements to treatment providers regarding the facts of his sexual offenses, he dropped out of the sex offender treatment program while he was incarcerated, and then withdrew from treatment and case management in the SVPTP because he said he did not need it. She also acknowledged Appellant was on level 2.1 of the SVPTP four stage treatment program, and he still had specific difficulty with the dynamic risk factors of poor problem solving, grievance, hostility thinking and negative social influences, and his static risk scores placed him in the above average to well above average risk to reoffend sexually range. (HT, pp. 127-144; R., pp. ____).

Lockard admitted her conclusion Appellant was safe to be at large was rendered in spite of the fact Appellant had not completed any sex offender treatment, showed minimal motivation to engage in treatment, only minimally participated when he did go to treatment sessions at the SVPTP, and still had active dynamic risk factors. She further admitted that even though Appellant's support system if released was an important part of her evaluation, she never contacted Appellant's family members to verify Appellant's claims regarding their support for him, and it would be important to know if the people he identified were in fact willing to support him, able to support him, and had the necessary knowledge and resources to hold Appellant accountable for his behavior if released. (HT, pp. 118, 142-149; R., pp. ____).

Dr. Tross was qualified as an expert in forensic psychology, and testified DMH assigned her to conduct Appellant's 2019-2020 annual review. Her protocol included reviewing all documentation and treatment records from the original commitment proceeding through the period

at issue in the annual review, scoring the Static-99R and Static-2002R. She also attempted to interview Appellant, but he refused to talk to her. (HT, pp. 161-165; R., pp. ____).

Based on Appellant's criminal history, including sexual and nonsexual offenses/convictions, Dr. Tross diagnosed Appellant with Other Specified Personality Disorder with antisocial traits. Based on the records she reviewed, she also diagnosed him with cocaine dependence, alcohol dependence and sedative anxiolytic dependence, and testified there was no evidence Appellant received any substance abuse treatment while incarcerated or out in the community. (HT, pp. 165-170, 179; R., pp. ____).

Dr. Tross testified Appellant's treatment records indicated his participation in treatment had been minimal at best, Appellant's compliance with treatment related assignments decreased in 2019, and he formally withdrew from the treatment track in the SVPTP in July 2019. Appellant also stopped attending scheduled weekly meetings with his case manager, telling the case manager he did not require case management. (HT, pp. 170-173; R., pp. ____).

The 2008-2015 records Lockard neither requested nor reviewed revealed Appellant physically assaulted seven other residents and had to be transferred out of the facility at one point to get him stabilized, and he was kept in isolation as a behavioral precaution. After 2016, Appellant's physical aggression decreased, but he continued to lash out and be verbally assaultive and demeaning toward others. Dr. Tross testified Appellant has a level of distorted thinking that everyone is out to get him or deliberately harm him, prevent him from having something he wants, and assigns nefarious intent to others without facts or evidence to support it. (HT, pp. 174-176; R., pp. ____).

Appellant's scores on the Static-99R and the Static-2002R were seven and six, respectively, which put him in the well above average to above average risk to reoffend range. Dr.

Tross testified the assessment tools only include detected and charged offenses by convicted sex offenders, and do not account for undetected, uncharged, or unconvicted offenses, so the risk projections could be an underestimation of an individual's risk to reoffend sexually. (HT, pp. 184-186; R., pp. ____).

In addition to his high Static scores, Dr. Tross found Appellant had numerous dynamic risk factors he needed to address in treatment, including: 1) lack of emotionally intimate relationships with adults;² 2) lifestyle impulsiveness; 3) poor problem solving; 4) resistance to rules and supervision, 5) grievance hostility; 6) negative social influences; 7) hostility toward women; 8) callous lack of concern for others; and 9) dysfunctional coping. She testified there had been some abatement of Appellant's impulse control, specifically related to the decrease in physical assaults on others, but the records did not indicate any improvement regarding Appellant's other dynamic risk factors. (HT, pp. 178-197; R., pp. ____).

Dr. Tross concluded Appellant had failed to really address his personality disorder while in treatment, and he continued to exhibit significant interpersonal difficulties, distorted thinking, affective instability and impulse control. She testified his mental status had not so changed he is safe to be at large, and opined that he should remain in the SVPTP for further treatment. (HT, p. 198, State's Exhibit 1; R., pp. ____).

The circuit court found no probable cause to believe Appellant's mental status had so changed he was safe to be at large, and there was sufficient evidence presented to support the State's contention Appellant still met the criteria for confinement and continued treatment. The court further found releasing Appellant would create a risk of him reoffending, and he should

²Contrary to Appellant's statements to Lockard, Dr. Tross testified the treatment program records consistently noted Appellant had not had any family contact for several years, so based on the records, his purported support system does not exist. (HT, pp. 198-198; R., pp. ____).

remain confined for treatment. (Order Denying Annual Review Trial for 2019-202, dated February 23, 2020; R., pp. ____). This appeal followed.

STANDARD OF REVIEW

“On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding.” In re Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003); *see also* In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 342 (2002) (on appeal of a non-jury law case, the findings of fact will not be disturbed unless found to be without evidentiary support); In re Corley, 365 S.C. 252, 616 S.E.2d 441, 444 (Ct. App. 2005) (trial court's probable cause ruling in SVPA annual review hearing will not be disturbed unless there is no evidence reasonably supporting it). When reviewing a trial court's rulings in a SVPA case, the appellate court will only reverse the trial court if there is no evidence to support the trial judge's ruling. In re Harvey, 355 S.C. 53, 584 S.E.2d 893, 896 (2003) (*citing* In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 315 [2001]); In re Brown, 372 S.C. 611, 643 S.E.2d 118, 120–21 (Ct. App. 2007) (same). The appellate court is concerned with the existence of evidence, not its weight. Brown, 643 S.E.2d at 121.

ARGUMENT

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large.

Appellant contends the circuit court erred in finding no probable cause to believe his mental status has so changed he is safe to be at large, and denying his request for a new commitment trial. In essence, Appellant maintains the mere fact he presented expert testimony indicating he was safe to be at large mandates a finding of probable cause and a subsequent trial. Appellant's argument ignores relevant South Carolina case law virtually on-point with this case. Further, his argument both undermines the purpose of an annual review hearing under the SVPA, and renders the presiding judge irrelevant by reducing the probable cause determination to a mere ministerial act.

In a SVPA annual review probable cause hearing, the committed person has the burden to show there is probable cause to believe his mental condition has so changed he can safely be released from civil commitment. Tucker, 578 S.E.2d at 722; S.C. Code. Ann. §44-48-110 (2018). “In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator.” In re Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (quoting Brown, 643 S.E.2d at 122-23. “Probable cause ‘does not demand any showing that such a belief be correct or more likely true than false.’” Brown, 643 S.E.2d at 123 (quoting Texas v. Brown, 460 U.S. 730, 742 [1983]). “The very term itself, ‘probable cause,’ does not import absolute certainty.” *Id.* at 118, 122.

In the context of an annual review probable cause hearing under the SVPA, the original commitment proceedings establish the person has a mental abnormality or personality disorder that makes him likely to commit future acts of sexual violence. Thus, the circuit court must

determine whether the evidence presented at an annual review hearing would lead a reasonable person to believe and conscientiously entertain a suspicion the person's mental status has so changed he is now safe to be at large.

Contrary to Appellant's contention that probable cause is mandated by competing expert testimony, making the probable cause determination necessarily requires consideration of more than the mere existence of evidence. Rather, the court must consider the credibility of the witnesses and substance of the evidence presented. *See State v. Keith*, 356 S.C. 219, 588 S.E.2d 145, 147 (Ct. App. 2003) (probable cause determination requires a practical, common-sense decision based on the totality of evidence presented, "including the veracity and basis of knowledge of persons supplying information").

Appellant states he "is unaware of any published South Carolina decision addressing the appropriate probable cause standard under S.C. Code §44-48-110." (Brief of Appellant, p. 9). To the contrary, Tucker expressly addresses that issue. Notably, Appellant completely ignores Tucker in his argument.

Tucker involved an annual review hearing with competing experts. Tucker's expert testified that since Tucker took responsibility for his sexual offending and was "capable and motivated towards continuing sex offender treatment", he should continue his treatment in an outpatient setting. 578 S.E.2d at 721. However, the State's expert testified that although Tucker had progressed in treatment, he had additional treatment goals he needed to meet before he could be eligible for release. *Id.* at 722. The Supreme Court upheld the denial of probable cause, stating while evidence existed Tucker could be released to an outpatient setting, Tucker failed to show his condition had so changed he was safe to be at large, and if released, unlikely to commit sexually violent acts. *Id.*

Further, In re Corley, 365 S.C. 252, 616 S.E.2d 441 (Ct. App. 2005), also involved a SVPA annual review hearing with competing experts. In affirming the circuit court's finding of no probable cause to believe Corley's mental status had so changed he was safe to be at large, this Court found:

Evidence reasonably supports the circuit court's probable cause finding. Although Corley made progress, his behavior remained "a big problem." He received at least five major disciplinary citations in the year prior to the review, some of which involved his "manipulating to use the telephone" to make sexually inappropriate calls. Corley had been involved in a sexual relationship with a staff member, and had threatened staff. Additionally, he had numerous unexcused absences from group sessions. Corley had not completed treatment. At the time of the hearing, he was on the lowest level in the Treatment Incentive Program due to his inappropriate behavior on the unit.

Id. at 444.

While Appellant's misbehavior issues did not rise to the level reflected in Corley, the picture presented by the evidence in this case is as compelling. Appellant still had significant problems during the review period, including verbal assaults on others in the treatment program, impulse control, a disciplinary involving contraband, compliance with treatment requirements, multiple absences from treatment sessions, refusal to cooperate with the annual review evaluator, and even formally withdrawing from treatment altogether during the annual review period. In addition, the records reflected little insight or progress on any of the dynamic risk factors that make Appellant more likely to reoffend sexually if released.³

Appellant's reliance on In re Sipe, 239 P.3d 871 (Kan. Ct. App. 2010), and In re Miles, 276 P.3d 232 (Kan. Ct. App. 2012), is unavailing. In both cases, the lower court's annual review

³While Appellant told Lockard he would continue outpatient sex offender treatment if released, there is no legal requirement that he attend, and there is no evidence he had even explored options for outpatient treatment. Given the level of his participation in treatment while in the SVPTP, it defies reason to believe he will voluntarily attend outpatient treatment at his own expense if released.

probable cause determinations were based solely on the reports prepared and submitted by experts for the state and the committed person, and the appellate court applied a *de novo* standard of review.⁴ Sipe, 239 P.3d at 877; Miles, 276 P.3d at 236.

As in this case, SVPA annual review probable cause hearings are generally full evidentiary hearings with witness testimony rather than determinations based solely on expert reports, and South Carolina appellate courts apply a deferential standard of review for circuit court annual review probable cause determinations. *See Tucker*, 578 S.E.2d at 721-722; S.C. Code Ann. §44-48-110 (2018). Given the circuit court's ability to hear direct and cross-examination of witnesses as well as review submitted reports, the court has an inherent ability to consider the credibility and weight of the evidence before it, and the deferential standard of review recognizes that ability.

In this case, the circuit court received evidence from Dr. Tross detailing Appellant's lack of progress in treatment since he entered the treatment program in 2008, including specific notes by his direct treatment providers, the current status of his personality disorder, his numerous dynamic risk factors, and the multiple issues he needed to address in treatment to reduce his risk of reoffending sexually. Significantly, Appellant's refusal to participate in an interview with Dr. Tross for the annual review evaluation constituted further evidence of his negative attitude toward treatment, and supported the treatment records indicating Appellant's refusal to even minimally engage in treatment in any meaningful way.

⁴Appellant correctly asserts South Carolina's SVPA was originally premised on Kansas' sexually violent predator statute, and South Carolina appellate courts relied heavily on Kansas case law in interpreting the SVPA. Both the Kansas and South Carolina sexual predator statutes have been significantly amended, however, and South Carolina's case law regarding the SVPA no longer relies as heavily on Kansas law. One major difference is South Carolina's appellate standard of review for probable cause determinations, which is not *de novo*.

By comparison, Lockard's testimony was replete with vague generalities, and her responses to questions, particularly on cross-examination, were frequently non-responsive in substance. Further undermining the credibility of Lockard's opinion was her absolute reliance on Appellant's version of his treatment progress and current mental status⁵. Indeed, it was clear Lockard essentially ignored the consistent reports from Appellant's treatment providers indicating he had made little, if any, progress while in the treatment program to address his personality disorder and reasons for sexually offending.

An important part of Lockard's conclusion was the "family support" Appellant told her he would have if released. On cross-examination, however, Lockard was forced to admit she accepted Appellant's statements as fact, and never made any effort to contact Appellant's family members to verify they knew about Appellant's criminal history, his personality disorder, would help him avoid reoffending if he was released to the community, or even had the knowledge and resources to do so.

The totality of the evidence presented substantiated Dr. Tross' findings regarding Appellant current mental status, and her opinion that Appellant's mental status had not so changed he is safe to be at large. Further, the evidence directly undermined the basis for, and credibility of, Lockard's findings and opinion regarding Appellant's mental status and risk to reoffend sexually. The circuit court was able to see first hand the distinction between the experts as to their methodology, thoroughness and overall credibility.

There is ample evidence in the record supporting the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large. Accordingly,

⁵It is significant to remember Appellant refused to cooperate when Dr. Tross attempted to interview him as part of the annual review evaluation, but was apparently very chatty with Lockard as he regaled her with his self-aggrandizing views of his treatment progress and future plans.

the Court should affirm the circuit court's ruling and Appellant's continued confinement under the SVPA for long term control, care and treatment.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court finding of no probable cause to conduct an annual review trial and Appellant should remain in the SVPTP for treatment pursuant to the SVPA.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: s/Deborah R.J. Shupe
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE


I, Misty Alewine, certify I served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address reflected in the AIS system, and by depositing a copy in the United States mail, postage prepaid, addressed to:

James K. Falk, Esquire
jfalklaw@gmail.com

The Initial Brief and Designation of Matter has also been filed with the Court of Appeals through the AIS system.

I further certify that all parties required by Rule to be served have been served.

This 21st day of December, 2021.


MISTY ALEWINE
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29402
(803) 734-1399

Misty Alewine

From: Misty Alewine
Sent: Tuesday, December 21, 2021 4:48 PM
To: 'James Falk'
Cc: Deborah Shupe
Subject: John O'Neil Johnson
Attachments: John Oneil Johnson IBOR (02852091xD2C78).PDF

Good afternoon Mr. Falk,

We are filing the Brief in the Court of Appeals today. Attached is a scanned copy of the Brief which we are serving on you.

Thank you kindly,

MISTY ALEWINE, Legal Assistant
South Carolina Attorney General's Office
Criminal Division – Sexually Violent Predator (SVP) Unit
Office 803-734-1399
P.O. Box 11549 | Columbia, SC 29211
sca.gov



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